No. 14,197

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. O. BEDAL,

Appellant,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a corporation,

Appellee;

and

W. O. BEDAL,

Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEES OREGON SHORT LINE RAILROAD COMPANY, A CORPORATION, AND UNION PACIFIC RAILROAD COMPANY, A CORPORATION.

Appeals from the United States District Court for the District of Idaho

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10 South Main Street,
Salt Lake City, Utah.
L. H. ANDERSON,
E. H. CASTERLIN,
E. C. PHOENIX,
P. O. Box 530,
Pocatello, Idaho
Attorneys for Appellees,
Oregon Short Line Railroad Company
and
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GATEWAY PRINTERS – POCATELLO

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BRIEF OF APPELLEES OREGON SHORT LINE RAILROAD COMPANY, A CORPORATION, AND UNION PACIFIC RAILROAD COMPANY, A CORPORATION.

STATEMENT OF CASE

On October 3, 1950, one A. M. Powell instituted an action against the Union Pacific Railroad Company for personal injuries sustained by Powell at Banks, Idaho, on the 15th day of September, 1949, while employed as a car inspector and who recovered a judgment against the Union Pacific Railroad Company under the Federal Employers Liability Act in the sum of $15,000.00, (R 3-7, 128-131, 135, Ex. 2). The motion of the Union Pacific Railroad Company for Judgment Notwithstanding the Verdict (R 136-140, Ex. 2) was by the court overruled (R 141-142, Ex. 2).

An appeal was perfected (R 142-150 Ex. 2), but before the record was filed in this court the Union Pacific Railroad Company on December 15, 1951, compromised said judgment with Powell for the sum of $14,500.00 (R 150-151, Ex. 2) and the appeal was dismissed (R 152, Ex. 2).

Following this, and on October 3, 1952, the appellees, Oregon Short Line Railroad Company and Union Pacific Railroad Company instituted this action against The Hallack and Howard Lumber Company to recover the amount the Union Pacific Railroad Company had paid to satisfy the judgment in the Powell case, plus interest, costs and attorney fees (R 3-15). This action was and is based primarily upon a lease, Exhibit "A" attached to the complaint (R 8-14 and Ex.1) (the same as Ex. A attached to the complaint), R 126, and secondarily, upon implied indemnity, "or independent of said lease." Paragraph IX of the Complaint (R 7).

Upon the filing and service of said complaint the appellee, The Hallack and Howard Lumber Company, brought in as a third party defendant W. O. Bedal, the appellant herein (R 17-18).

September 21, 1953, the case of the Railroads vs The Hallack and Howard Lumber Company, and the third party action of The Hallack and Howard Lumber Company against W. O. Bedal, came on for trial, each being handled as separate cases, with the Court trying the case of the Railroads against The Hallack and Howard Lumber Company, and the third-party action of The Hallack and Howard Lumber Company against W. O. Bedal by the court and a jury (R 125).

Upon the conclusion of the Railroads' evidence they and the Lumber Company rested (R 234) and the court then found that the Union Pacific Railroad Company was entitled to recover from The Hallack and Howard Lumber Company under the indemnifying contract "and on account of the negligence found to have existed on the premises" (R 234-235). Findings of Fact and Conclusions of Law were then signed and filed (R 92-99) and judgment entered in favor of the Union Pacific Railroad Company and against The Hallack and Howard Lumber Company in the total sum of $18,334.15 (R 103-104).

The third party action of the Lumber Company against W. O. Bedal was then tried to the court and jury and upon conclusion of the Lumber Campany's evidence it and the third party rested (R 244), following which The Hallack and Howard Lumber Company's Motion for Directed Verdict in its favor (R 245-247) was by the court granted (R248-255). Verdict in favor of The Hallack and Howard Lumber Company against W. O. Bedal was returned (R 105-106) and judgment entered thereon (R 107-108).

From the judgment in favor of the Union Pacific Railroad Company against The Hallack and Howard Company (R 117-118), and from the judgment in favor of The Hallack and Howard Lumber Company against W. O. Bedal, Bedal has appealed (R 114-115).

No appeal has been taken by The Hallack and Howard Lumber Company from the judgment in favor of the Union Pacific Railroad Company and against The Hallack and Howard Lumber Company. That judgment is now final.

JURISDICTION

Jurisdiction of the District Court is based upon diversity of citizenship of the parties and that the amount involved, exclusive of interest and costs, exceeded $3,000.00. The appellees Oregon Short Line Railroad Company and Union Pacific Railroad Company are both citizens and residents of the State of Utah, and the appellee The Hallack and Howard Lumber Company is a resident and citizen of the State of Colorado (R 3, 68, 72). Accordingly the District Court had jurisdiction 28 U.S.C.A. 1332, and this Court ordinarily has jurisdiction to review such matters as those on appeal, 28 U.S.C.A. 1291, Rule 73, Federal Rules of Civil Procedure, but is without jurisdiction to reveiw the judgment of the Union Pacific Railroad Company vs. The Hallack and Howard Lumber Company. The Lumber Company not having appealed that judgment is final.

QUESTIONS INVOLVED AND MANNER IN WHICH THEY ARE RAISED

So far as the judgment in favor of the Union Pacific Railroad Company and against The Hallack and Howard Lumber Company (R 103-104) is concerned, the appellant says on page 87 of his Brief:

> "The sole question presented on this appeal from the judgment in favor of the Railroads is whether the trial court erred in construing Section 5 of the lease agreement (R 10) in such a way as to hold The Hallack and Howard Lumber Company responsible for the sole negligence of the Railroad."

Appellees, the Railroads, contend that as between them and the Lumber Company this question is moot. The Lumber Company has not appealed from the judgment and the judgment is as between these parties, valid and binding.

THE FACTS

This litigation arises out of the case of Albert M. Powell vs. Union Pacific Railroad Company. Powell, a car inspector of the Union Pacific Railroad Company was employed to make repaiirs to log cars at Banks, Idaho, and on September 15, 1949 (R 176-177) while logs were being unloaded from a truck on a road to the west of the tracks about 70 feet (R 179-212) a slab about four feet long weighing 60-70 pounds (R 201, 217) broke off from one of the logs and flew through the air striking and injuring him (R 185). This slab broke off from a log when the logs were about half way down the hill (R 217, 221, 225, 230, 232) and before the logs reached the landing (R 218). This landing was formed by a row of bunker logs to the west of the tracks to keep the logs from rolling across the tracks when they were unloaded (R 178) and was level to the west or to the foot of the hill for a distance of about 20 feet (R 190, 204, 214, 230). The road where the truck was located and when the logs were dumped was about 20 feet higher than the level of the tracks (R 188, 189, 212, 230).

The logs were pushed from the truck by a caterpillar and would strike the ground with considerable force (R 208), fall down the steep incline unrestrained, and the slab whcih

injured Powell was caused to break off because of the force of the drop (R 141). The logs after being unloaded would roll down the hill, onto the landing and against the bunker logs (R 178, 195, 209).

When the logs were ready to be dumped Powell stepped off the top of the log car onto the bunker log (R 181-182) and was seated on the bunker log, 60-70 feet north of where the logs were being dumped down the hill to the east (R 183, 215), when the accident occurred. Powell never saw the slab in flight until it was three or four feet from him (R 185, 190-191).

The placing of the bunker logs was done by Bedal (R 189, 207, 214), the cleaning of the bunker was done by Bedal (R 190, 207), the logs were hauled into Banks, unloaded and loaded by Bedal (R 171, 188, 191, 211, 239). The railroad had nothing to do with that (R 171, 188). The logs were owned by The Hallack and Howard Lumber Company (R 171, 156), who paid Bedal for hauling, unloading and loading of said logs on cars for shipment instead of The Hallack and Howard Lumber Company performing the work itself, all of which was done for the use and benefit of the Hallack and Howard Lumber Company (R 156). All of the unloading and loading of the logs, at the time Powell was injured, was being performed on the premises leased to The Hallack and Howard Lumber Company by the Railroads, appellees, herein, (Ex. 5, R 170, 238), and so admitted by The Hallack and Howard Lumber Company's failure to answer the Railroad's request for ad-

mission (Ex. 3, R 154, 155, 156). As to this there was and is no controversy (R 241).

Exhibit A attached to the Railroad Companys' complaint, and Exhibit 1 (the same as Exhibit A), contains the following indemnifying clause:

> "Section 5. * * * that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

These facts, together with the admissions made by The Hallack and Howard Lumber Company in its answer to the Railroad's complaint, fully and completely sustain the findings of fact and conclusions of law (R 92-99) and accordingly fully support the judgment entered therein in favor of the Union Pacific Railroad Company and against The Hallack and Howard Lumber Company (R 103-104), and from which The Hallack and Howard Lumber Company has not appealed.

ARGUMENT

THE JUDGMENT IN FAVOR OF THE UNION PACIFIC RAILROAD COMPANY AND AGAINST THE HALLACK AND HOWARD LUMBER COMPANY CANNOT BY THIS APPEAL BE DISTURBED SO FAR AS THE RAILROADS AND THE LUMBER COMPANY ARE CONCERNED.

The Lumber Company has not appealed from the judgment entered in favor of the Union Pacific Railroad Company and against the Lumber Company. That judgment certainly as between the parties thereto is final and cannot be affected by any appeal taken by the appellant W. O. Bedal.

It should be remembered that the Railroads, appellees herein, instituted their action against the Lumber Company and not against Bedal; he was brought in by the Lumber Company but the Railroads did not make themselves parties to the third party proceedings.

The case of the Railroads against the Lumber Company was tried by the court and findings and judgment made by the court in that case, and then the case of the Lumber Company vs. Bedal was tried by the court and a jury. (R 125). Separate judgments were entered. (R 103, 104, 107-108). The Railroad was not a party to the judgment against Bedal, and Bedal was not a party to the Railroads judgment against the Lumber Company. The Railroads never looked to Bedal for a recovery; they looked directly to the Lumber Company because of the lease it had and because it was responsible for what was being done at Banks under the lease.

The Lumber Company does not and cannot now say the judgment of the Union Pacific Railroad Company is not valid and binding.

> "Without an appeal a party will not be heard in an appellate court to question the correctness of the decree of the trial court."
>
> *Cherokee Nation vs. Blackfeather*
> 155 U.S. 218, 221, 39 L. Ed. 126, 127;
>
> *Bothwell vs. United States,*
> 254 U. S. 231, 65 L. Ed. 238.

Even if the judgment was wrong that does not make it void. No timely appeal having been taken by the Lumber Company the judgment remains effective and is a conclusive adjudication

> *Rooker vs. Fidelity Trust Co.,*
> 263 U. S. 413, 415, 68 L. Ed. 362, 365.

The judgment is conclusive upon the parties to it, and it cannot be collaterally attacked.

> *Schodde vs. United States,*
> (9 Cir.) 69 Fed. (2d) 866, 870.

> "It is well settled that in the absence of a cross-appeal an appellee cannot attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."
>
> *Smith vs. Boise City, Ida.*
> (9 Cir.) 104 F. (2d) 933.

"Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."

Morley Construction Co., vs. Maryland C. Co.,
300 U. S. 185, 81 L. Ed. 593, 598.

"* * * the rule is settled in the Appellate Court, that a party not appealing cannot take advantage of an error in the decree committed against himself, and also, that the party appealing cannot allege error in the decree against the party not appealing."

Chittenden vs. Brewster,
69 U. S. 191, 17 L. Ed. 839, 841.

"It is well settled that an appeal errors affecting a party who does not appeal will not be reviewed, * * *"

Salter vs. Ulrich
(Cal.) 138 Pac. (2d) 7, 146 A. L. R. 1344, 1348.

See also—

Phillips vs. Phillips
(Cal.) 264 Pac. (2d) 926, 930.

Denman vs. Smith
(Cal.) 97 Pac. (2d) 451, 452.

The Lumber Company cannot question the judgment against it. Neither can it question the findings or conclusions of the court.

California Canning Peach Growers vs. Williams,
(Cal.) 78 Pac. (2d) 1161, 1164.

The judgment in favor of the Union Pacific Railroad Company and against the Lumber Company is satisfactory to both parties thereto. That is the affect of the judgment because the Lumber Company has not appealed and the judgment has become final as between the parties. Inasmuch as Bedal is not named therein and is not a party thereto his attempted appeal cannot affect that judgment and it must and should be affirmed as between the Union Pacific Railroad Company and the Lumber Company irrespective of whether Bedal can attack it so far as the judgment of the Lumber Company against him is concerned.

THIS COURT HAS NO JURISDICTION TO HEAR THE APPEAL OF BEDAL FROM THE JUDGMENT ENTERED IN FAVOR OF THE UNION PACIFIC RAILROAD COMPANY AND AGAINST THE HALLACK AND HOWARD LUMBER COMPANY AND THAT APPEAL SHOULD BE DISMISSED.

Bedal was never a party to the case of the Railroads against the Lumber Company. The Railroads never made him a party and did not make themselves a party to or in any way become involved in the third party action against Bedal. The case was tried independent of the action of the Lumber Company against Bedal and the judgment went against the Lumber Company and not against Bedal. The fact that Bedal was brought in as a third party defendant by the Lumber Company does not make Bedal a party to the action of the Railroads against the Lumber Company. The third party action is only procedural, aand is for the purpose of avoiding

circuity of action and to dispose of the entire subject matter arising from one set of facts. It does not change the substantive law.

> *1 Federal Practice and Procedure*
> (Barron and Holtzoff) 838 Sec. 422.

Whether a third party should be brought in is discretionary with the court.

> *1 Federal Practice and Procedure*
> (Barron and Holtzoff) 839, Section 423.

> "To summarize the foregoing change, it may be said that under Rule 14 as originally framed the defendant might have brought in as a third party defendant either a person who was secondarily liable to him or a person who was primarily liable to the plaintiff. *Under the 1948 Amendment only a person who is secondarily liable to the original defendant may be brought in.*" (emphasis ours)

> *1 Federal Practice and Procedure*
> (Barron and Holtzoff) 834-837, Sec. 421.

As stated, the Railroads did not in any way become involved in the third party proceedings, and did not amend their complaint to state a claim against Bedal, there was no issue between the Railroads and Bedal, and the Lumber Company could not compel the Railroads to accept Bedal as an additional defendant.

> See Text of Advisory Committee's Note to Amendment of Rule 14 A, commencing on page 835 of the above Text.

While it is true that Bedal as a third party defendant could assert any defenses which the Lumber Company might have to the plaintiff's claim, that was only to protect him as against the Lumber Company, (see Text of the Advisory Committee Note, page 837), and certainly does not authorize him to collaterally attack or wipe out a judgment obtained by the Union Pacific Railroad Company against the Lumber Company to which he was not a party. The Lumber Company is satisfied with the judgment against it and, of course, cannot now urge error of any kind.

Appellant Bedal was not a party to the action of the Railroads against the Lumber Company, and only a party can appeal.

Rule 73 (a) Federal Rules of Civil Procedure.

The appeal is not taken by a party, therefore this Court of Appeals has no jurisdiction, and the appeal must be dismissed.

Penwell vs. Newland
(9 Cir.) 180 Fed. (2d) 551.

Where a defendant was not named in a judgment he was not a party, and an appeal which included such defendant was dismissed.

Armstrong vs. New LaPaz Gold Mining Co.
(9 Cir.) 107 Fed. (2d) 453.

The judgment against the Lumber Company can only be enforced by the Union Pacific Railroad Company, and it can only enforce it against the Lumber Company. The judgment

is not adverse to appellant Bedal, and is not directed against him.

Milgram vs. Loew's Inc.,
(3 Cir.) 192 F. (2d) 579, 586.

"One who is not a party to a record and judgment is not entitled to appeal therefrom. * * *
"The merely general nature and character of the interest which the movers allege they have in the papers here filed is not, in any event, of such a character as to authorize them in this proceeding to assail the action of the court below. *This is more obvious in this case since the act of the court which is assailed has been accepted by those who are parties to the record."* (emphasis ours)

Matter of Leaf Tobacco Board of Trade.
222 U. S. 578, 56 L. Ed. 323.

Likewise in the case at Bar—the judgment has been accepted by the only parties to it, the Union Pacific Railroad Company and The Lumber Company.

The case at bar cannot be distinguished from the case of *Payne vs. Niles,* 61 U.S. (20 How. 219-221) 15 L. Ed. 895, wherein the court said:—

"Payne & Harrison, therefore, have no right to sue out a writ of error upon the judgment in the suit between Niles & Co., and Knox, to which they were not a party, nor can they make Knox or his representative a defendant in a writ of error brought upon the judgment on the petition of intervention to which Knox nor Broadwell, his syndic, was a party.
"This writ of error attempts to do both, and is therefore not warranted by law."

The 7th Circuit Court of Appeals *In Re Phoenix Dress Co.* 131 F. (2d) 726 did not require the citation of authorities to hold that an appeal could only be taken by a party to the suit or by someone duly authorized for that purpose.

The judgment against the Lumber Company has adjudicated the rights of the Union Pacific Railroad Company and the Lumber Company. The Lumber Company is satisfied with the judgment against it, or it would have appealed. It cannot now claim otherwise. The judgment is final, and whatever right appellant might have to attack the judgment so far as the third party case of the Lumber Company against him is concerned, he cannot by this appeal destroy a valid and subsisting judgment the Railroad has obtained against the Lumber Company.

IN ANY EVENT THE JUDGMENT IN FAVOR OF THE UNION PACIFIC RAILROAD COMPANY AND AGAINST THE LUMBER COMPANY IS SUPPORTED BY THE FACTS AND THE LAW AND MUST BE AFFIRMED.

The record and judgment in the Powell case is conclusive and binding upon the Lumber Company in this action.

Booth-Kelly Lumber Company vs. Southern Pacific
(9 Cir.) 183 Fed. (2d) 902; 20 A.L.R. (2d) 695;

Washington Gas Light Co., vs. Dist. of Columbia
161 U. S. 316, 40 L. Ed. 712;

Standard Oil Company vs. Robbins Dry Dock and Repair Company,
(2d Cir.) 25 Fed. (2d) 339; 32 Fed. (2d) 182.

Probably the only fact not established in the Powell case to fasten liability upon the Lumber Company under the lease was that the injuries to Powell occurred "by reason of the use or occupation of said premises by the lessee * * * or from any cause whatsoever growing out of said lessee's use thereof" (Sec. 5 of the lease). This evidence was supplied in this case against the Lumber Company. All of the unloading and loading of the logs at the time Powell was injured was being done on the premises leased to The Hallack and Howard Lumber Company by the Railroads, appellees herein, (Ex. 5 R 170, 238) and so admitted by the Lumber Company's failure to answer the Railroad Company's request for admission (Ex. 3, R 154, 155, 156). As to this there was and is no controversy (R 241).

The Lumber Company was in possession of the premises by virtue of the lease but had employed W. O. Bedal to haul, unload and load the logs (R 171, 188, 191, 211, 239). The railroad had nothing to do with that (R 171, 188). The logs were owned by the Lumber Company, who paid Bedal for the hauling, unloading and loading of the logs on cars for shipment instead of the Lumber Company performing the work itself under the lease, all of which was done by Bedal for the use and benefit of the Lumber Company (R 156).

The slab which struck Powell came from a log after it

was being dumped down a steep incline and unrestrained (R 141, 208). None of these facts are disputed, nor can they be by the Lumber Company. As a matter of fact, they are not disputed by Bedal. He offered no testimony whatsoever.

The proposition is so clear as to admit of no controversy that the Union Pacific Railroad Company was required to pay damages for injuries sustained by Powell through the acts and conduct of the Lumber Company in the use and occupation of the leased premises and by the acts and conduct of its agent W. O. Bedal. Hence the court ruled that the Union Pacific Railroad Company was entitled to recover from the Lumber Company under the indemnifying contract "and on account of the negligence found to have existed on the premises" (R 234-235). Accordingly the Findings of Fact and the portion of Finding XI (R 97) objected to by Bedal (but not by the Lumber Company) are fully supported by the facts. Incidentally the Court never ruled upon Bedal's objection to this finding, and of necessity it must stand in any event as between the Railroads and the Lumber Company.

That the conclusions of the court (R 98-99) and the judgment entered in favor of the Union Pacific Railroad Company and against the Lumber Company (R 103-104) are fully sustained by the law will now be discussed.

SECTION 5 OF THE LEASE, IS CLEAR AND UNAMBIGUOUS AND FULLY PROTECTS THE RAILROADS FOR ANY DAMAGES OR LOSS ARISING OUT OF THE USE OR OCCUPATION OF THE PREMISES.

On page 87 of Bedal's Brief it is asserted,—

> "The sole question presented on this appeal from the judgment in favor of the Railroads is whether the trial Court erred in construing Section 5 of the lease agreement (R. 10) in such a way as to hold The Hallack and Howard Lumber Company responsible for the sole negligence of the Railroad."

There is nothing in this record that the court so held. The court held to the contrary. The court allowed recovery under the lease "and account of the negligence found to have existed on the premises" (R 234-235).

Clearly this was not the negligence of the Railroad for it had nothing to do with hauling, unloading or loading of the logs. This was done by the Lumber Company by and through its Agent Bedal.

The provision of the lease is broad enough to indemnify the Railroad for its own negligence, if any, as we will presently show, but what the lease provision does is to indemnify the Railroad Company against the acts or conduct of the Lumber Company irrespective of how such acts or conduct are characterized. *Booth-Kelly Lumber Company vs. Southern Pacific,* supra, page 912, wherein the court stated that the "Southern Pacific seeks indemnity not for its own negligence, but rather for that of Booth-Kelly."

Section 5 of the lease required the Lumber Company to indemnify the Railroads irrespective of how the injuries occurred so long as they arose out "of the use or occupation of said premises * * * or from any cause whatsoever growing

out of said lessee's use thereof." This provision is broad enough to require the Lumber Company to indemnify the Railroads even if they were negligent.

Booth-Kelly Lumber Company vs Southern Pacific Company, Supra;

Ringling Brothers-Barnum and Bailey C. Shows vs. Olvera
(9 Cir.) 119 Fed. (2d) 584;

Sante Fe RR Co., vs. Grant Brothers Construction Company
228 U.S. 177, 57 L. Ed. 787;

Rice vs. Pennslyvania R. Co.,
(2d Cir.) 202 Fed. (2) 861;

Mpls.-Moline Co., vs. Chic. M. St. P. P. & R. Co.
(8 Cir.) 199 Fed. (2d) 725;

Aluminum Company of America vs. Hully
(8 Cir.) 200 Fed. (2d) 257;

Buckeye Cotton Oil Co., vs. Louisville & N.R. Co.
(6 Cir.) 24 Fed. (2d) 347;

Kokusai Kisen Kabushiki Kaisha vs. Columbia S. Co.
23 Fed. Supp. 403, affirmed 100 Fed. (2d) 1016;

National Transit Co., vs. Davis
(3 Cir.) 6 Fed. (2d) 729.

In *Ringling Brothers-Barnum & Bailey C. Shows vs. Olvera,* Supra, this court held that when a contract released

all claims, demands, causes of action, damages, etc., but did not mention "negligence" ordinary negligence nevertheless was included, citing Sante Fe RR Co., vs. Grant Bros., Construction Company, supra, in which case the court held that the Railroad and the Construction Company were on equal footing and they had the right to contract and while the word "negligence" was not mentioned expressly that it was necessarily intended by the use of such terms as "all risk of loss and damage," "at consignee's risk of loss and damage." "all risk of accident to person and baggage."

In *Rice vs. Pennsylvania R. Co.*, supra, one Luria, who had nothing to do with the loading of the scow, was held responsible to the United States under an agreement to hold the Government harmless from any and all claims of whatsoever nature for injuries to persons or property occurring during the removal of the material. The court said:—

> "It is impossible to conceive how any valid claim could arise against the Government for injuries 'occurring during the removal' unless its employees were negligent. Consequently we see no way to interpret the covenant otherwise than as an unequivocal expression of intent to indemnify the United States against the negligence of its own employees."

In *Minneapolis-Moline Co., vs. Chic. M. St. P.P. & R. Co,.* supra, no mention is made in the contract of any negligence. However, the court held that the terms were broad enough to exempt the Railroad Company from the result of its own negligence and that such a contract contravened no public policy. It refers to the case of John P. Gorman Coal

Co. vs. Louisville & N.R. Co., 213 Ky. 551, 281 S.W. 487, and quoting from that case the court said,—

> "Appellant might have made it a condition of liability that it should be guilty of some negligence, but this it did not do. It was free to make any contract it chose so long as it was not against public policy, and, having chosen to undertake an absolute liability rather than a qualified one, it cannot now be heard to complain of the choice it made."

This particularly covers liability of the Lumber Company in the case at Bar under Section 5 of the lease.

In *National Transit Co., vs. Davis,* supra, the contract was to indemnify and save harmless from and against all claims, suits, costs, losses and expenses in any manner resulting from or arising out of the laying, maintenance, renewal, repair, use or existence of said pipe, and no mention was made of negligence. This was held to be broad enough to include negligence of the Railroad. The Court stated,—

> "It would seem clear that if the indemnifying clause of the contract were limited to claims and suits where the Railroad was blameless there would in point of fact be nothing to which such indemnifying clause would apply."

In *Buckeye Cotton Oil Company vs. Louisville & N. R.* Co. supra, the indemnifying clause did not include the word negligence. The court held, however, that the agreement was clear in this respect, for it said— "to hold the first party harmless from the claims and demands of any and all persons

on account of any damages or injuries caused directly or indirectly by the existance, location, or condition of any structure or obstruction of any kind on the premises of the second party or by any obstruction on said tracks."

As mentioned by this court in *Booth-Kelly Company vs. Southern Pacific Company*, supra, page 910, Booth-Kelly's interests were served by the making of this contract, and that, of course, is true in the case at Bar. The Railroads were under no obligation to unload logs or load logs onto their cars; this was the obligation of The Hallack and Howard Lumber Company, and it wanted this particular site upon which to perform its work of unloading, scaling and loading the logs .It was a benefit to the Lumber Company to have possession of these premises, otherwise it would not have entered into a lease and paid the rental thereon, and likewise the Railroad Companies were not going to give up possession of its premises for such work as the Lumber Company intended to perform without having protection for some such an accident as occurred to Powell. The interest here on the part of the Lumber Company was similar to the interest which Booth-Kelly Company had in the spur track built by the Southern Pacific Company for it, for it was by these leases that both parties were benefited, and particularly the Lumber Companies.

In the Booth-Kelly Lumber Company case, in talking of the meaning of the paragraph relating to indemnity and the contemplation of the parties, the court said,—

> "And in view of the fact that in most cases where demand for indemnity arises, the claimed indemnitee

> must have been found liable by reason of some negligence, we think it extremely unlikely that all such cases were intended to be excluded from the operation of the first portion of the paragraph. Otherwise, this portion of the paragraph would have little or no application to any actual case."

That, of course, is true with reference to the provisions of Section 5 of the Lease in this case. It was intended certainly that the Railroad Company should have protection from any damages or suits that might arise by reason of the use and occupation of the premises by the Lumber Company. Two State cases are particularly applicable,—

> *Griffiths vs. Broderick*
> (Wash.) 182 Pac. (2d) 18, 175 A.L. R., 1;

Southern Pacific Company vs. Fellows, 71 Pac. (2d) 75, 77—A case which the Supreme Court of California declined to review; and under an indemnity clause in a contract, which we think cannot be distinguished from Section 5 of the lease in the case at Bar, it was held that the provisions were so sweeping and all embracing that although it did not contain an express stipulation indemnifying the appellant against liability caused by its own negligence it accomplished the same purpose.

To the same effect see—

> *New Orleans Great Northern R. Co. vs. S. T. Alcus & Co.,* (La.) 105 S. 91.

The Union Pacific had no duty to either unload these

logs or load them; that was an obligation of The Hallack and Howard Lumber Company, the owner and shipper of the logs. Therefore when the Railroads gave up a portion of their premises for the benefit of The Hallack and Howard Lumber Company whereby it could perform its function of unloading and loading the logs and the Railroad had no control over or right to direct the manner in which the logs were unloaded, it certainly wanted protection against any act of the Lumber Company irrespective of how damages might accrue or how and in what manner it might be called upon to answer or pay for such damages; that is the clear interpretation of the provisions of the lease.

In this case, however, there was no negligence on the part of the Union Pacific Railroad Company. It was held liable to Powell because of the acts and conduct of the Lumber Company, who had possession of the premises and who was performing the act of unloading the logs by and through its Agent Bedal, and who had made a safe place unsafe.

The Union Pacific was held liable on the theory that it had not furnished Powell with a safe place in which to work. This was a non-delegable duty which it owed to Powell irrespective of who made it unsafe. *Booth-Kelly Lumber Company vs. Southern Pacific Company*, supra, page 911, Note 7.

Snohomish County vs. Great Northern RR Company
(9 Cir.) 130 Fed. (2d) 996;

Burris vs. American Chicle Co.
(2d Cir.) 120 Fed. (2d) 218;

Standard Oil Company vs. Robins Dry Dock and Repair
(2d Cir.) 32 Fed. (2d) 182.

In the last case cited the court, after referring to three cases, said:

> "In all three of those cases a third party had recovered against a person who was under a non-delegable duty to furnish a safe place to such third person, but in each case the primary and affirmative wrong was occasioned by the defendant against which indemnity was sought."

In *Govero vs. Standard Oil Company* (8 Cir.) 192 Fed. (2d) 962, 964, the court said:

> "We know of no public policy which would prevent a landlord and a tenant from agreeing that the tenant should assume, and agree to indemnify the landlord against, the risk of loss, damage and injuries occurring on the premises during the term of the lease, whether due to the negligence of the landlord or not."

The court then cites the United States Supreme Court case of Sante Fe RR Co. vs Grant Brothers Construction Company, supra, to the effect that the highest public policy is found in the enforcement of the contract which was actually made.

Appellant refers to Section 13 of the lease as containing the word "negligence" whereas Section 5 does not. The reason for this is obvious. Section 13 relates to dangers of fire set out by the railroad where it would be the acter and protects

against loss to lessee's property arising from such fires and nothing else. While the word "negligence" appe ars, it wouldn't be necessary. Any other phrase would cover the situation and be equally effective. Section 5 relates to all other damages and is clear and explicit that the Lumber Company agrees to indemnify the Railroads for damages and judgments in any manner accruing by reason of the use and occupation of the premises, or from any cause whatsoever growing out of said lessee's use thereof. This language is so clear and unambiguous that to insert or add the word "negligence" or "employee" as appellant infers should be in the section would certainly add nothing by way of intent or clarity.

Appellant's sole theory appears to be that the court construed the lease to protect the railroads against their own negligence. No where in the record is there any foundation for such a conclusion. As a matter of fact, and as we have stated, the lease in this particular case protects the railroads against the act and conduct of the Lumber Company and its Agent Bedal, and without which Powell would not have been injured. The statement of the court that he found for the Union Pacific Railroad Company under the contract "and on account of the negligence found to have existed on the premises" (R 234-235) plus Finding of Fact No. XI (R 97) and which finding is supported by all of the evidence—there is no contrary evidence—appellant's theory that the court construed the lease to protect the railroads against their own negligence has no foundation. The provisions of the lease are broad enough, and exceptionally clear, to protect the railroads if they were in fact negligent, but they were not.

As stated, the Union Pacific was held liable to Powell because it had a nondelegable duty to provide him with a safe place to work, which place of work was made unsafe by the *active* conduct of the Lumber Company and its Agent Bedal and not by any act of the Union Pacific.

We can see no difference in principle between the indemnity agreement considered in the Booth-Kelly case and the provision contained in section 5 of the agreement in the case at Bar. except that Section 5 of the agreement herein is more inclusive and more clear that The Hallack and Howard Lumber Company must hold harmless and protect the Railroads from damages, judgments, injuries or loss by reason of the use or occupation of the premises "or from any cause whatsoever growing out of said lessee's use thereof." The agreement in Booth-Kelly case required the same thing, except different language was used.

In any event we think no one can read the provisions of Section 5 and have any misconception about the intent of the language used or what it covers, and certainly there is no dispute here between the Railroad Companys and the Lumber Company with reference to this section of the lease, because the Union Pacific Railroad Company obtained a judgment against the Lumber Company based upon this theory, and with which judgment the Lumber Company is satisfied.

We think appellant misconceives or misconstrues the difference between contribution and indemnity. Here the Railroad Company and the Lumber Company or its agent Bedal were not in pari delicto. The primary duty of unloading the

logs and to see that they were properly unloaded was that of the Lumber Company or its agent Bedal. The Railroad had no duty to perform in that connection and accordingly performed no duty. We think there can be no doubt but that Powell could have sustained an action for negligence directly against the Lumber Company or Bedal, and, as the trial court remarked, had it not been for the Federal Employers Liability Act the action probably would have been filed against Bedal instead of against the Union Pacific (R 253).

That appellant misconceives or misconstrues the difference between the law of contribution and the law of indemnity under the facts in this case is made apparent by the decisions of this court in the Booth-Kelly case on pages 908-910 of the opinion, by the decision of this court in Snohomish vs. Great Northern Railroad Company, 130 Fed. (2d) 996, and others.

Appellant says that in the Booth-Kelly case the industry had violated a specific provision of the agreement. The Lumber Company in the case at Bar in effect did the same thing. It created a dangerous condition, which it should not have done, which caused the Union Pacific Railroad Company to be mulcted in damages without its fault and by which Section 5 of the lease required indemnity.

It matters not that Powell might have actually been a foot or two off the leased premises. His injuries arose out of the use and occupation of the leased premises.

Kokusai Kisen Kabushki Kaisha vs. Columbia S. Co. 23 Fed. Supp. 403, 405, affirmed 100 Fed. (2) 1016;

Booth-Kelly Lumber Company's act was found to have been the active, direct and primary cause of the injuries to Powers and so, in the case at Bar, the court found that the Union Pacific Railroad Company was guilty of no active negligence, which was correct, and found that the active, direct, proximate and primary cause of Powell's injuries was that of the Lumber Company (R 97), and that is correct, because the evidence is all one way that the injuries to Powell occurred when the Lumber Company through its Agent Bedal was unloading the logs onto the leased premises, possession of which it had. The railroads had nothing to do with any of such activities.

Appellant cites cases on pages 90, 93 and 94 of its Brief, all of which cases we have reviewed, and none of them, or as a matter of fact none of the cases cited elsewhere in appellant's Brief, contain provisions that are as clear and unambiguous as are the provisions of Section 5 of the lease herein discussed.

In the Jensen (it should be Jansen) case, the owner who had leased the premises to Jansen had control over the stairs and there was no obligation on the part of Jansen to make alterations, but only to repair. The obligation was upon the owner, not Jansen, to make the steps comply with the City Ordinance.

In the Kay case on page 93 of appellant's Brief the indemnity agreement referred to an overhead loading machine, but the person injured struck a draw bridge, which was not mentioned in the agreement.

The cases referred to on page 94 of appellant's Brief are clearly distinguishable.

In the Martin case the clause upon which plaintiff relied for indemnity was so limited that it could only be construed to be effective to release the lessor of any claim the lessee had. The court indicated that if it had been drawn to release claims of others the result would have been different.

In the Foster case, this case was affirmed by the Court of Appeals in 201 Fed. (2d) 727, in which the facts are more fully shown than in the District Court's opinion, and in addition to active negligence on the part of the Can Company there was also active negligence on the part of the Railroad Company, that is, concurrent negligence. The Railroad was negligent because of insufficient lighting and uneven track. The court of appeals said that the Booth-Kelly case was not applicable because in that case the Lumber Company was primarily liable and the Railroad only secondarily liable.

In the Westinghouse Electric Elevator Company case the contract specifically limited indemnity to acts or omissions of appellee's agents, servants or employees.

In the Glenns Falls Indemity Company case the contract only protected against claims which arose out of performance, non-performance or mal performance of a contract to provide a gunite job on the exterior face of a substation. The injuries to the person involved did not fall within the provisions of the contract and the court found the indemnitee was primarily at fault and was guilty of active negligence not merely passive negligence.

In the Sinclair Prairie Oil Company case the agreement was not clear, and the jury held Sinclair liable and absolved Engle from any negligence.

In the Southern Railway Company case the indemnity clause particularly excepted Coca Cola from liability unless it was at fault. The court said Coca Cola would have been liable had it not been for the exception. The Railroad in that case was admittedly negligent and Coca Cola was not.

The case of *Southern Pacific Company vs. Layman*, 173 Ore. 275, 145 Pac. (2d) 295, had no application in the Booth-Kelly case, and it has none here. In the Layman case the accident involving the harvesting machine happened solely as a result of the Railroad's negligence in the operation of its train.

Thus far it has been demonstrated that appellant has been arguing directly in the face of the Booth-Kelly decision, and he continues to do so; arguing that the Union Pacific Railroad Company acquiesced in the dangerous condition and accordingly was a joint tort feasor and cannot have indemnity. If such an argument possesses any soundness it applies only so far as the case of the Lumber Company vs. Bedal is concerned and it cannot affect the final and binding judgment of the Union Pacific Railroad Company as against the Lumber Company; but in any event appellant's argument proceeds upon the theory that the Railroad acquiesced in the dangerous condition—meaning the unloading of the logs.

Who created the dangerous condition? So far as the railroads are concerned it was The Hallack and Howard Lumber

Company by and through its Agent Bedal. He was unloading the logs. He was the active participant. The Union Pacific Railroad Company was held liable to Powell not because it acquiesced in any such dangers but because it owed a non-delegable duty to furnish Powell a safe place to work, and the Lumber Company, through Bedal, had made it unsafe. The Railroad was not the acter; at most its negligence was merely passive, and it was held responsible to Powell for failing to warn him that the logs were to be dropped or to get out of the way; the same reason for holding the Southern Pacific Railroad Company liable to Powers for failing to warn him of the presence of the wood cart. Booth-Kelly Lumber Company made the same argument of acquiescence as appellant herein makes. This court in the Booth-Kelly case disposed of that contention in a few words:—

> "Thus the situation was one precisely within the words of section 95, supra. Southern Pacific was held liable because of its 'negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other', i.e. of Booth-Kelly. That this is the type of case which the compilers of section 95 had in mind is made clear by their comment on the section, (95a). The court's finding that defendant's negligence was the 'active, driect, proximate and primary' cause, negatives the existance of the acquiescence mentioned in the later portion of the comment." page 911, 183 Fed. (2d).

This finding was supported by the facts, and the same finding in the case at Bar is supported by the facts. To iterate, it was only because of the acts and conduct of the Lumber

Company and its agent Bedal that the Union Pacific Railroad Company was held liable to Powell, and the Union Pacific Railroad Company is entitled to full indemnity the same as was the Southern Pacific Company.

Following the above quoted portion from the Booth-Kelly case this court said:

> "We hold that the contract provides that in the circumstances here existing, and thus found by the Court, Southern Pacific was entitled to the full indemnity it claims. It would have been entitled to no less, under the rule in the Astoria case, supra, even in the absence of a contract."

Acquiescence, of course, is not in the case, but certainly the Railroads did not acquiesce in the cutting or splintering of the logs when they were cut and felled in the forest and that was probably the reason the slab broke off and struck Powell when the logs were dumped (R 206-218).

In addition to the Booth-Kelly case and others which we have cited supporting the judgment of Union Pacific Railroad Company against The Hallack and Howard Lumber Company, we respectfully refer also to the following:—

Culmer vs. Baltimore & O. R. Co.,
1 F. R. D. 765;

Watkins vs. Baltimore & O. R. Co.,
29 Fed. Supp. 700;

Deep Vein Coal Company vs. Chic. & E. I. Ry Co.
(7 Cir.) 71 Fed. (2d) 963;

Waylander—Peterson Company vs. Great Northern Ry Co.
(8 Cir.) 201 Fed. (2d) 408.

In the *Waylander-Peterson Company vs. Great Northern Ry Company* case the court, in approving the views of the trial court, stated that the railroad's laibility arose because of a non-delegable duty, and that—

> "The primary duty rested upon Waylander-Peterson Company to perform its work on the bridge so as not to endanger the workmen who were required to work in proximity thereto. Its neglect was the primary, active cause of Lawrence's injuries. The Railroad Company's negligence, as between the parties, was secondary and passive."

Incidentally the court refers to Restatement on Restitution, Sections 95, 95a, also referred to in the Booth-Kelly decision.

SUCH CONTRACTS WITH WHICH WE ARE CONCERNED HERE ARE NOT AGAINST PUBLIC POLICY.

Booth-Kelly Lumber Company vs. Southern Pacific
(9 Cir.) 183 Fed. (2d) 902; 20 A.L.R. (2d) 695;

Snohomish County vs. Great Northern RR Company
(9 Cir.) 130 Fed. (2d) 996;

Griffiths vs. Broderick
(Wash.) 182 Pac. (2d) 18, 175 A.L.R. 1;

42 C.J.S. 572, Sec. 7;

27 Am. Jur. 459, Sec. 8.

THAT BEDAL WAS AN INDEPENDENT CONTRACTOR DOES NOT RELIEVE THE LUMBER COMPANY OF ITS LIABILITY TO THE RAILROAD COMPANY UNDER THE LEASE.

The mere fact that as between the Lumber Company and Bedal, Bedal was an independent contractor, does not relieve the Lumber Company of its obligation to the Railroads under the lease agreement or independent of the lease.

See—Note 7, page 911 of 183 Fed. (2d), the Booth-Kelly case.

> "He cannot escape liability by letting work out like this to a contractor and shift responsibility on to him if any accident occurs."

Chicago vs. Robbins,
67 U.S. 418, 17 L. Ed. 298;

Robbins vs. Chicago,
71 U.S. 4 Wall 657, 18 L. Ed. 427, 430;

George A. Fuller Co., vs. Otis Elev. Co.,
245 U.S. 489, 62 L. Ed. 422;

Fegles Cons. Co., vs. McLaughlin Const. Co.
(9 Cir.) 205 Fed. (2d) 637;

Burris vs. American Chicle Co.,
(2 Cir.) 32 Fed. (2d) 182;

Standard Oil Co., vs. Robbins Dry Dock & Repair Company
(2 Cir.) 32 Fed. (2d) 182;

Dallas & G. R. Co., vs. Adle
(Tex.) 9 S.W. 871, 876;

Shearman & Redfield on Negl.
5th Ed. Sec. 14;

57 C.J.S., Sec. 587 p. 357;
27 Am. Jur. 515, Sec. 38.

The lease in question was never assigned by the Lumber Company to Bedal. The Lumber Company was in control and had the exclusive possession of the leased premises.

> "A party to a contract may assign rights under it, but he cannot assign obligations." *Pioche Mines Consol. vs. Fidelity-Philadelphia Trust Company* (9 Cir.) 202 Fed. (2d) 944.

IMPLIED INDEMNITY

While the Railroads action against the Lumber Company is based primarily upon the indemnifying agreement which we have been discussing, nevertheless the Railroads proceeded also on the theory that the Lumber Company was liabile to the Union Pacific Railroad Company under implied indemnity and independent of said lease. See paragraph IX of the Railroads' Complaint (R 6-7).

Booth-Kelly Lumber Co., vs. Southern Pacific Co., supra;

Snohomish County vs. Great Northern Railway Co. (9 Cir.) 130 Fed. (2d) 996;

Washington Gas Light Company vs. District of Columbia (161 U.S. 316, 40 L. Ed. 712);

George A. Fuller Company vs. Otis Elevator Co., 245 U.S. 489, 62 L. Ed. 442;

Burris vs. American Chicle Co., (2 Cir.) 120 Fed. (2d) 218;

Southwestern Bell Telephone Co., vs. East Texas Public S. Co., (5 Cir.) 48 Fed. (2d) 23;

Waylander-Peterson Co., vs. Great Northern Ry. Co., (8 Cir.) 201 Fed. (2d) 408.

All of the facts which are in this case and are undisputed and which we have previously been discussing fully justify the findings of the court, conclusions of law, and the judgment in favor of the Railroads and against the Lumber Company on the theory of implied indemnity.

As mentioned in the Booth-Kelly case, the Southern Pacific was entitled to full indemnity and "it would have been entitled to no less, under the rule in the Astoria case, supra, even in the absence of a contract." And, as stated in Burris vs. American Chicle Company, supra—

> "It is immaterial that there was no express provision for indemnity in the contract between these parties."

In *Snohomish County vs. Great Northern Railway Company*, supra, this court said:

> "If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely malum prohibitum, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

See also—*Baillie vs. City of Wallace*,
24 Ida. 706, 135 Pac. 850, 854.

CONCLUSION

We think there can be no question about the binding and conclusive effect of the judgment of the Union Pacific Railroad Company against The Hallack and Howard Lumber Company, and that the judgment must be affirmed, and with respect to that judgment Bedal's appeal should be dismissed.

We submit that the facts in this case being clear and undisputed establish without any question the liability of the Lumber Company to the Railroads, for it was by and through its Agent Bedal that the logs were cut and felled in the forest, hauled to Banks and unloaded, and that during the un-

loading of the logs Powell was injured, for which, through no fault of the Union Pacific Railroad Company it was compelled to pay damages for Powell's injuries.

Section 5 of the lease could not be clearer than it is if any other words were used. There is no dispute in this case between the Railroads and the Lumber Company as to Section 5 being applicable. The language is clear that the Lumber Company agrees to hold the Railroads harmless and to protect the Railroads from damages or judgments which accrue in any manner by reason of the use or occupation of the premises or from any cause whatsoever growing out of said lessee's use thereof. No clearer language could be used to indicate liability of the Lumber Company to the Railroads for indemnity relating to any loss or damage the railroads sustained because of the use and occupation of the leased premises.

Here the parties were on an equal footing, free to contract with respect to liability, or anything else.

In *John P. Gorman Coal Company vs. Louisville & N.R.* Co. (Ky) 281 S.W. 487, in addition to what has been quoted from the case previously herein, the court said:—

> "The appellee (railroad), by this contract, was not attempting to contract against its common law liability for negligence: It was simply providing for such liability. * * * it was not compelled to construct this switch (neither was the Union Pacific and Oregon Short Line required to give a lease to The Hallack and Howard Lumber Company). * * *As here involved, these obligations simply put the appellant in the position of an insurer of appellee's possible lia-

> bilities arising out of the maintenance and operation of this spur track. This contract did not, nor could it, exonerate the appellee from responding in damages to those injured by its negligence. * * * But having so responded, the appellee had the right to look for reimbursement to the one who had agreed to insure it, so to speak, against such loss."

There, of course, is no question raised, and none can be raised, but that The Hallack and Howard Lumber Company is bound by the record and judgment made in the Powell case, and also in this case, for it has not appealed. But in the Powell case, when the trial court ruled upon the Motion of the Union Pacific for Judgment. Notwithstanding the Verdict, Judge Clark found that Powell was struck by a slab from a log being unloaded from a truck on the road some twenty feet above the location of the bunkers where the logs were loaded on the train, and then stated,—

> "Whether the operation in driving the trucks to the top of this steep enbankment, pushing the logs from the truck and allowing them to descend this steep incline to the track was negligence was a question for the jury." (R 141, 142).

This was the operation of The Hallack and Howard Lumber Company by and through its Agent Bedal (Ex. 3 R. 154-156, 170), so that the findings of the court to the effect that The Hallack and Howard Lumber Company by and through its Agent Bedal was negligent and that that is what caused the injuries to Powell puts the matter at rest completely, both under the lease, Section 5, and also on the basis of implied indemnity.

The Railroads and the Lumber Company were not joint tort feasors; the primary cause of the accident to Powell was the fault or negligence of the Lumber Company.

See—*States SS Company vs. Rothschild International Steve. Company* (9 Cir.) 205 Fed. (2d) 253.

That the judgment in favor of the Union Pacific Railroad Company against The Hallack and Howard Lumber Company should be affirmed is,

Respectfully submitted,

BRYAN P. LEVERICH
L. H. ANDERSON
E. H. CASTERLIN
E. C. PHOENIX
Attorneys for Appellees,
Oregon Short Line Railroad Company, Union Pacific Railroad Company.